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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1080

JAKE L. HAMON, SUNRAY DX OIL COMPANY AND TEXACO INC., *Petitioners*

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

M. DARWIN KIRK
HOMER E. MCEWEN, JR.
J. P. GREVE
P. O. Box 2039
Tulsa 2, Oklahoma

DALE E. DOTY
1028 Connecticut Avenue
Washington, D. C. 20036
Attorneys for Sunray DX Oil Company

WM. TAYLOR LAGRONE
500 Vaughn Building
Dallas, Texas
Attorney for Jake L. Hamon

ALFRED C. DECRANE, JR.
JAMES J. FLOOD, JR.
WILLIAM K. TELL, JR.
P. O. Box 52332
Houston 52, Texas
Attorneys for Texaco Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jake L. Hamon, Sunray DX Oil Company and Texaco Inc., Petitioners herein, hereby respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in cases Nos. 17,922 and 18,052 in that Court on February 11, 1964.[1]

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[1] Cases Nos. 17,922 and 18,052 in the court below both involved petitions for review of same orders issued by the Federal Power Commission in *Jake L. Hamon, et al*, 29 FPC 784, 1152. Case No. 17,922 related to the petition for review filed by the Public Service Commission of the State of New York in which proceeding Texaco Inc. and Sunray DX Oil Company intervened. Case No. 18,052 related to the petition for review filed by Jake L. Hamon, Sunray DX Oil Company and Texaco Inc.

OPINIONS BELOW

The orders of the Court of Appeals for the District of Columbia Circuit (Appendix, *infra*, pp. 1a and 2a) are not yet reported. The opinion of the Court of Appeals in *Public Service Commission of the State of New York, et al*, v. *Federal Power Commission, et al*, D. C. Cir., Nos. 17,582, 17,627, 17,628, 17,859 which, by stipulation controlled the disposition by the court below of the instant cases is not yet reported, but is set out in Appendix B to the petitions in Nos. 987 and 1026, this Term.

JURISDICTION

The orders and judgments of the Court of Appeals were entered on February 11, 1964 (Appendix, *infra*, pp. 1a and 2a). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has the power to include in permanent certificates of public convenience and necessity issued under Section 7 of the Natural Gas Act, a condition requiring the producer, to whom the certificate is issued, to make reparations of monies previously collected under temporary certificates which were devoid of any condition with regard to reparations.

2. Whether, in certificate proceedings under Section 7 of the Natural Gas Act, the Commission may refuse to consider probative cost and financial evidence adduced by producers in support of their initial contract prices.

STATUTORY PROVISIONS INVOLVED

Sections 4, 5 and 7 of the Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U.S.C. 717c, 717d, 717f, are set out in Appendix A to the petition in No. 1026, this Term.

STATEMENT

During 1958 and 1959, Petitioners entered into separate contracts with United Gas Pipe Line Company (United) for the sale of natural gas produced from their respective properties in the Corpus Christi Northwest Field in Texas Railroad Commission District No. 4. Each of these contracts provided an initial base price of 18 cents per Mcf plus a tax reimbursement for the first ten years of deliveries, and a 1 cent escalation in price during each five-year period thereafter. The contracts also contained an alternative provision relating to periodic price redeterminations every five years.

Petitioners filed applications with the Commission for permanent certificates of public convenience and necessity to make these sales for resale in interstate commerce to United. Because of delays attendant the processing of such applications and resulting irreparable loss, Petitioners also requested temporary certificates so that they could begin deliveries to United pending Commission action upon the applications for permanent certificates. The Commission issued temporary certificates as requested by Petitioners, authorizing the commencement of sales to United at the contract price of 18.0 cents per Mcf plus tax reimbursement.

The temporary certificates thus issued to Petitioners were in the standard form used by the Commission

known as "non-conditioned" or "unconditional" temporary certificates, as distinguished from "conditioned" temporary certificates in which the Commission includes express provisions for possible refunds of monies collected pending action on the permanent certificates. Pursuant to and in accordance with these unconditional temporary certificates, Petitioners began deliveries of the gas to United under their contracts with United which they filed with the Commission as rate schedules.

Petitioners' applications for permanent certificates were subsequently consolidated for hearing with similar applications filed by other producers for sale of gas to United from the same field.[2] At these hearings, which commenced on May 2, 1961 and, after recesses, concluded on September 28, 1961, Petitioners and the other applicants introduced, in support of their certificate applications, evidence including, *inter alia*, a comprehensive economic analysis of the supply and demand for natural gas, trends in exploration for and the development of natural gas, productivity of the drilling effort and trends in costs and prices. In addition, each of the applicants' contracts was compared with the contracts covering other current sales in Texas Railroad Commission District No. 4, and the advantages of these contracts to the pipeline purchaser, and thereby to the ultimate consumer, were established. Further, there was also introduced an

[2] Among the applications thus consolidated were those of Cities Service Company, Tennessee-Texan Oil Company and Tidewater Oil Company. Although by order issued March 18, 1963, the Commission severed the application filed by Cities Service Company, the evidence submitted on its behalf remained available, under established Commission precedent, to support Petitioners' applications.

estimate of the natural gas industry's requirements for financing new supplies of gas and the relationship of those requirements to the initial prices provided in Petitioners' contracts.

The only opposing evidence offered was the evidence sponsored by one Commission Staff witness. This evidence, submitted in the form of an exhibit, consisted of a compilation of all sales made since January 1, 1955 in Texas Railroad Commission District No. 4, without, however, any explanation, interpretation, opinion or recommendation concerning the data listed, other than Staff counsel's claim that reasonable inferences could be drawn from it.

In his recommended decision (29 FPC 785, *et seq*), the Presiding Examiner rejected all of the evidence submitted by Petitioners and other applicants "as not germane to this certificate proceeding * * *." (*Id.* at 792). Instead, basing his decision solely on the so-called in-line price for sales from Texas Railroad Commission District No. 4, the Examiner recommended that permanent certificates be issued to each of the Petitioners with a condition prohibiting

> "* * * any total initial price, including all reimbursements and charges, greater than 15 cents per Mcf at 14.65 psia from the date of issuance of this order until such prices may be lawfully changed in the manner provided by the Natural Gas Act." (*Id.* at 800).

With regard to the contention that the permanent certificates should also be conditioned to require the producers to refund the difference between the price charged since the date of initial delivery under the temporary certificates and the price allowed by the

Commission in issuing the permanent certificates, the Examiner stated (29 FPC at 799):

> "The instant producer applicants have been operating, pending this hearing, pursuant to effective temporary certificates issued between October 24, 1958, and August 29, 1959, containing no price condition. The validity of these temporary, unconditioned certificates has not up to this time been challenged on appeal.
>
> "Under these circumstances, it must be held that there is no basis for ordering retroactive refunds, in view of the controlling principle laid down by the Commission in *Skelly* Op. No. 362 * * *."

Thereafter on April 22, 1963, the Commission adopted the Examiner's Decision as its own, stating, in part (29 FPC at 785):

> "* * * We believe the examiner's decision reached correct conclusion based upon proper reasoning and is consistent with our recent decisions involving sales in Railroad District No. 4 in *Skelly Oil Company*, et al., Opinion No. 362, 28 FPC 401, issued August 30, 1962, and *Texaco Seaboard, et al.*, Opinion No. 383, 29 FPC 593 issued March 27, 1963. We find nothing in the exceptions which is not adequately answered in the examiner's decision or in our *Skelly* opinion, and we will therefore adopt the examiner's decision in this proceeding."

Petitioners sought review in the court below of the price condition imposed by the Commission (Case No. 18,052). The Public Service Commission of the State of New York, which had intervened in the proceeding before the Commission, appealed the failure of the Commission to condition the permanent certificates to

require refunds of the monies previously collected above the 15 cent price fixed in the Commission's order herein (Case No. 17,922). Inasmuch as the Commission's decision in *Skelly Oil Company, et al*, Op. 262, on which it based its action in the instant proceeding was already under review in the court below on appeals raising the same questions in cases Nos. 17,582, 17,627, 17,628 and 17,859, the parties to the instant proceedings stipulated to be bound, insofar as the Court of Appeals was concerned, by that Court's decision on these questions in Nos. 17,582, *et al*.[3]

On January 23, 1964, the Court of Appeals issued its Opinion in Nos. 17,582, *et al*, in which it held that under this Court's decision in *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378 (1959), the Commission was justified in disregarding the cost and financial evidence of record and in conditioning the permanent certificates to require the initial price be reduced to 15 cents per Mcf solely on the basis of certain prices being paid in the area. The court further held that the Commission has the statutory power under Section 7(e) of the Natural Gas Act to attach to the permanent certificates a condition requiring the producers to refund all amounts previously collected under their effective filed rate schedules and unconditional temporary certificates in excess of the 15-cent price condition imposed. Since the court held that this power to require refunds is not mandatory, it remanded the case to the Commission to reconsider the question of refunds in light of the equities involved.

Thereafter, on February 11, 1964, the court below issued its order in the instant proceeding, in which,

[3] In view of this stipulation, no record or briefs were filed in the instant cases in the court below.

in accordance with its decision in Nos. 17,582, *et al*, and the stipulation of the parties herein, it affirmed the Commission's order in No. 18,052 and remanded the case in No. 17,922 for further proceedings consistent with its decisions in cases Nos. 17, 582, *et al*.

REASONS FOR GRANTING THE WRIT

Two petitions for writs of certiorari have been filed with, and are now pending before, this Court seeking review of the decision of the court below in its cases Nos. 17, 582, *et al*. *Prado Oil and Gas Company* v. *Federal Power Commission*, No. 987, this Term; *Skelly Oil Company, et al*, v. *Federal Power Commission, et al*, No. 1026, this Term. Both of these petitions raise the question presented by the instant petition as to whether the Commission has the statutory authority to attach to permanent certificates conditions requiring producers to refund monies previously collected under unconditional temporary certificates. The petition in No. 987 also raises the further question likewise presented in the instant petition, namely, whether in a certificate proceeding under Section 7 of the Natural Gas Act, the Commission may refuse to consider probative cost and financial evidence adduced by producers in support of their initial contract prices. The reasons for granting the writ set out at pages 5 to 12 of the petition in No. 987 and at pages 8 to 27 of the petition in No. 1026 are therefore fully applicable in this proceeding. These reasons, which are hereby incorporated by reference herein, demonstrate the need for review by this Court of the decisions of the court below in this case and in cases Nos. 17,582, *et al*.

In these circumstances and in light of the stipulation entered into by the parties herein in the court

below, Petitioners are filing the instant petition for writ of certiorari to protect and preserve their rights on the issues presented by the petitions in No. 987 and No. 1026 on which the court below based its decision in this proceeding. Accordingly, it is suggested that the Court may deem it appropriate to withhold action on the instant petition until after decision has been reached in Nos. 987 and 1026 and then to dispose of this case in accordance with the decision in those cases.

Respectfully submitted,

M. Darwin Kirk
Homer E. McEwen, Jr.
J. P. Greve
P. O. Box 2039
Tulsa 2, Oklahoma

Dale E. Doty
1028 Connecticut Avenue
Washington, D. C. 20036

Attorneys for
Sunray DX Oil Company

Wm. Taylor LaGrone
500 Vaughn Building
Dallas, Texas
Attorney for Jake L. Hamon

Alfred C. DeCrane, Jr.
James J. Flood, Jr.
William K. Tell, Jr.
P. O. Box 52332
Houston 52, Texas
Attorneys for Texaco Inc.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,922

PUBLIC SERVICE COMMISSION OF STATE OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

TEXACO, INC., *Intervenor*

SUNRAY DX OIL COMPANY, *Intervenor*

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges, in Chambers.

Order

Upon consideration of the stipulation entered into by joint motion filed September 26, 1963, in this court providing that the disposition of the above-entitled cases should be governed by the dispositions in case Nos. 17582, 17627, 17628 and 17859, decided by this court on January 23, 1964, it is

ORDERED that this case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of this court in case No. 17582.

Per Curiam.

Dated: February 11, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,052

JAKE L. HAMON, SUNRAY DX OIL COMPANY AND TEXACO, INC., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges, in Chambers.

Order

Upon consideration of the stipulation entered into by joint motion filed September 26, 1963, in this court providing that the disposition of the above-entitled case should be governed by the disposition in cases Nos. 17582, 17626, 17628 and 17859, decided by this court on January 23, 1964, it is

ORDERED and ADJUDGED by this court that the order of the Federal Power Commission on review in this case is affirmed.

Per Curiam.

Dated: February 11, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1080

JAKE L. HAMON, SUNRAY DX OIL COMPANY AND TEXACO INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

As petitioners explained, the parties below stipulated that the court of appeals decision in *Public Service Commission of New York et al. v. Federal Power Commission, et al.*, 329 F. 2d 242, pending on petition for certiorari in Nos. 987 and 1026, this Term, should control the lower court's disposition of this case, since the Commission in the present case had based its decision on the order under review in that case. Since petitioners rely entirely on the reasons for granting certiorari advanced in Nos. 987 and 1026, we concur in their suggestion (Pet. 9).

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that action on their petition be withheld until after the decision in Nos. 987 and 1026 and that the disposition of the case be in accordance with the action taken in those cases.[1]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

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[1] The reasons why certiorari should be denied are fully stated in our brief in opposition to Nos. 987 and 1026, to which we respectfully refer the Court.

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MEMORANDUM FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

KENT H. BROWN, *Counsel*
55 Elk Street
Albany, New York

MORTON L. SIMONS
1815 H Street, N. W.
Washington, D. C.

Attorneys for Respondent

May 27, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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MEMORANDUM FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Respondent Public Service Commission of the State of New York concurs in petitioners' suggestion that this Court withhold action on the petition in No. 1080 until after the decision in Nos. 987 and 1026 and that disposition of this case be in accordance with the action taken in those cases.

Our position on whether certiorari should be granted is set forth in our brief in Nos. 987 and 1026, to which we respectfully refer the Court.

Respectfully submitted,

KENT H. BROWN, *Counsel*
55 Elk Street
Albany, New York

MORTON L. SIMONS
1815 H Street, N. W.
Washington, D. C.

Attorneys for Respondent

May 27, 1964

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